

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 13, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2012AP1785-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2009CF968

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TIMOTHY S. DOSS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: EUGENE A. GASIORKIEWICZ, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Timothy Doss appeals from a judgment convicting him of manufacturing/delivering narcotics and from a circuit court order denying his postconviction motion seeking a new trial due to ineffective assistance of trial counsel. While trial counsel may have performed deficiently when she failed to

call a witness at trial, we conclude that Doss was not prejudiced by counsel's performance. Additionally, we reject Doss's claim that in her opening statement, counsel suggested that Doss bore the burden of proof at trial. We affirm the judgment and the order.

¶2 The jury convicted Doss of delivering methadone to a fellow prison inmate, Scott Clark. Clark survived a methadone overdose. Clark testified at trial that Doss had a methadone prescription and offered to sell him methadone in exchange for money placed in Doss's prison canteen account by Clark's girlfriend. A Department of Corrections officer testified that Doss was the only inmate in the prison who had a methadone prescription, and a videotape taken the same day Doss passed the methadone pills to Clark showed Doss receiving his methadone. However, the guard did not follow the institution's practice of requiring Doss to swallow the pill, wait, and then have his mouth inspected. Doss did not swallow the methadone and passed the methadone to Clark.

¶3 Postconviction, Doss argued that his trial counsel was ineffective for failing to present the testimony of Andrew Borom. Trial counsel had subpoenaed Borom for an earlier trial date, but she did not issue a new subpoena for the adjourned trial date. Borom did not appear at the adjourned trial. We agree with the circuit court that counsel performed deficiently in not obtaining a subpoena to procure Borom's appearance at trial. *State v. Love*, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62 (trial counsel performs deficiently when counsel's representation falls below an objective standard of reasonableness). We turn to whether Doss was prejudiced by counsel's deficient performance.

¶4 To establish prejudice, "the defendant must affirmatively prove that the alleged defect in counsel's performance actually had an adverse effect on the

defense.” *State v. Reed*, 2002 WI App 209, ¶17, 256 Wis. 2d 1019, 650 N.W.2d 885. The defendant “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* (citation omitted).

¶5 Postconviction, Doss argued that Borom’s testimony was necessary to refute Clark’s testimony. Clark testified that he spoke with Borom about whether the pills he obtained from Doss were methadone and how long it would take to feel the effects of the methadone. Borom would have testified that he knew Doss and Clark, he recalled Clark’s overdose, he did not talk to Clark about Doss’s pills, he never facilitated a drug transaction between Clark and Doss, he never obtained pills from Doss, and he never saw Doss give pills to Clark.

¶6 The circuit court concluded that even if it would have been preferable to present Borom’s testimony, the absence of Borom’s testimony was not prejudicial to Doss. Borom’s testimony would not have created a reasonable probability that the outcome of the trial would have been different. As the circuit court concisely reasoned:

It was Mr. Clark who interacted directly with the defendant, who testified that the defendant told him he had methadone and would part with it in exchange for canteen credit. Mr. Clark’s interface with Mr. Borom was, at best, peripheral to the central issue in this matter. Although this Court concedes that the information would have provided the jury with information they could have used to assess the credibility of Mr. Clark, the Court is of the opinion that it would not have affected uncontroverted testimony leading to the defendant’s guilt. Here, as stated before, the medication Mr. Clark overdosed on was methadone. The only individual in the prison who had a prescription for methadone was the defendant. Given the nature of these uncontroverted facts established through various other witnesses at the time of trial, this Court is of the opinion

that there exists no reasonable probability that this defendant would have been found not guilty of this offense.

¶7 We agree with the circuit court that Doss was not prejudiced by the absence of Borom's testimony. The evidence at trial was more than sufficient to convict Doss: Clark testified that Doss supplied him with methadone, Doss was the only inmate with access to methadone, and the prison did not follow its procedures for confirming that Doss consumed his methadone at the time it was dispensed. It is not reasonably probable that Borom's testimony would have led the jury to acquit Doss.

¶8 Doss next claims that his trial counsel was ineffective because she suggested in her opening statement that Doss bore the burden of proof at trial. During her opening statement, counsel stated:

And just in closing of my opening argument, I'll say that there's going to be—the state is trying to show there's only one way this could have happened, and we're saying there's many different ways this could have happened and hope to show that to you, so all I ask is that you hold them to the standard that they're required to be held to by the law, and you can hold me to that same standard as well.

¶9 Doss argues that these remarks shifted the burden of proof from the State to him and deprived him of the presumption of innocence. We need not address the quality of counsel's performance if we can conclude that counsel's performance did not prejudice the defendant. *State v. Kuhn*, 178 Wis. 2d 428, 438, 504 N.W.2d 405 (Ct. App. 1993). Even if counsel's remarks could be deemed imprudent or inaccurate, Doss was not prejudiced because the remarks were harmless in light of the following: (1) elsewhere in her opening statement, counsel told the jury that the State had the burden to prove Doss's guilt beyond a reasonable doubt and Doss was presumed innocent; (2) prior to opening statements, the circuit court instructed the jury regarding the burden of proof and the presumption of

innocence; (3) during her closing argument, trial counsel reminded the jury that the State had the burden to prove Doss's guilt beyond a reasonable doubt; and (4) the circuit court instructed the jury regarding the burden of proof and presumption of innocence before deliberations began.

¶10 Jurors are presumed to follow the instructions they receive. *State v. Truax*, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989). During voir dire, the jurors all confirmed they could follow the court's instructions in deciding the case. We cannot conclude that had trial counsel not made her isolated remark during her opening statement, the outcome of Doss's trial would have been different.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

